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Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors

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FEDERAL COURT (PUTRAJAYA) — SUIT NO BKA-1–12 OF 2014(P)
RAUS SHARIF CHIEF JUSTICE, ZULKEFLI PCA, RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASAN LAH AND BALIA YUSOF FCJJ

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12 MARCH 2018

Constitutional Law — Federal and state law — Constitutionality — Acquisition of lands — Lands alienated to body corporate established under Chief Minister of Penang (Incorporation) Enactment 2009 ('the Enactment') — Whether State Legislature has powers to make laws under Enactment — Powers of parliament to make laws under Incorporation (State Legislatures Competency) Act 1962 ('the Act') — Whether the Act and Enactment valid

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The petitioner was the registered owner of lands which were acquired by the Penang State Government ('the first respondent') through the Director of Lands and Mines, Penang ('the third respondent') and the Land Administrator of the South West District of Penang ('the fourth respondent'). The lands were acquired for a public purpose pursuant to s 8 of the Land Acquisition Act 1960.

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The fourth respondent conducted an enquiry and offered compensation in the sum of RM40,161,639.50 to the petitioner and this was accepted by the petitioner under protest. The petitioner later applied to the fourth respondent to refer its objection as to the amount of compensation to the High Court. The High Court ordered the compensation amount to be increased to

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RM44,964,837. The fourth respondent then alienated the lands to the fifth respondent, a body corporate established under the Chief Minister of Penang (Incorporation) Enactment 2009 ('the Enactment'). The lands were alienated with the express condition that they were to be used for educational purposes only. The petitioner commenced a civil suit at the High Court against the first,

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third, fourth and fifth respondents, challenging the validity of the acquisition of the lands and sought the return of the lands as it was alleged that the acquisition was done mala fide and not for a public purpose ('the civil suit'). The civil suit is still ongoing. According to the petitioner, the constitutionality

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of the Incorporation (State Legislatures Competency) Act 1962 ('the Act') and the Enactment could not be dealt with by the High Court. Hence the present petition.

Held, dismissing the petition:

(1) Exercising the delegated legislative power pursuant to the Act and in accordance with s 3 and its First Schedule, the Penang State Legislature passed the Enactment. Section 3 of the Enactment provides for the incorporation of the Chief Minister of Penang. Sections 4 and 5 of the Enactment state the various powers of the Chief Minister of Penang incorporated, which could fairly and reasonably comprehended as matters ancillary or incidental to its incorporation (see para 76).

(2) The Act relates to a matter enumerated in the Federal List, this within the legislative competence of Parliament under art 74 of the Federal Constitution ('the FC'). The Enactment relates to a matter enumerated in the Federal List, on which the power to make laws has been validly delegated by Parliament to the State Legislature under art 76A of the FC. In doing so, Parliament or State Legislature had not covertly or indirectly encroached upon forbidden territory. Accordingly, the Act makes provision with respect to a matter which Parliament has power to make laws while the Enactment makes provision with respect to a matter which the Penang State Legislature has powers to make laws. The Act and the Enactment are not invalid (see paras 77–79).

[Bahasa Malaysia summary

Pempetisyen adalah pemilik berdaftar tanah-tanah yang diambil oleh Kerajaan Negeri Pulau Pinang ('responden pertama') melalui Pengarah Tanah dan Galian, Pulau Pinang ('responden ketiga') dan Pentadbir Tanah Daerah Barat Daya Pulau Pinang ('responden keempat'). Tanah-tanah tersebut diambil bagi tujuan awam di bawah s 8 Akta Pengambilan Tanah 1960. Responden keempat menjalankan inkuiri dan menawarkan pampasan berjumlah RM40,161,639.50 kepada pempetisyen dan pempetisyen menerimanya dengan protes. Pempetisyen seterusnya memohon kepada responden keempat untuk merujuk bantahannya terhadap jumlah pampasan ke Mahkamah Tinggi. Mahkamah Tinggi memerintahkan agar jumlah pampasan dinaikkan menjadi RM44,964,837. Responden keempat kemudian memberi milik tanah-tanah tersebut kepada responden kelima, satu badan korporat yang ditubuhkan bawah Enakmen Ketua Menteri Pulau Pinang (Perbadanan) 2009 ('Enakmen'). Tanah-tanah tersebut diberi milik dengan syarat nyata bahawa kesemuanya hendaklah digunakan bagi tujuan pendidikan sahaja. Pempetisyen memulakan satu guaman sivil di Mahkamah Tinggi terhadap responden pertama, ketiga, keempat dan kelima, mencabar kesahan pengambilan tanah-tanah dan memohon pemulangan semula kesemuanya kerana mendakwa bahawa pengambilannya dilakukan secara mala fide dan bukan tujuan awam. Guaman sivil ini masih berjalan. Menurut pempetisyen, keperlembagaan Akta Perbadanan (Kekompetenan Badan Perundangan Negeri) 1962 ('Akta') dan Enakmen tidak boleh didengar oleh Mahkamah Tinggi. Oleh itu, rayuan ini.

Diputuskan, menolak petisyen:

(1) Menjalankan kuasa pewakilan perundangan di bawah Akta dan selaras dengan s 3 dan Jadual Pertamanya, Badan Perundangan Negeri Pulau Pinang meluluskan Enakmen. Seksyen 3 Enakmen memperuntukkan pemerbadanan Ketua Menteri Pulau Pinang. Seksyen 4 dan 5 Enakmen menyatakan pelbagai kuasa Ketua Menteri Pulau Pinang yang diperbadankan, yang secara adil dan munasabah boleh difahami sebagai hal-hal perkara sampingan pemerbadanan (lihat perenggan 76).

(2) Akta adalah berkaitan hal perkara di bawah Jadual Persekutuan dan ini di bawah kekompetenan Parlimen di bawah perkara 74 Perlembagaan Persekutuan ('PP'). Enakmen berkaitan dengan hal perkara yang termaktub di bawah Jadual Persekutuan iaitu kuasa menggubal undang-undang secara sahnya diwakilkan oleh Parlimen pada Badan Perundangan Negeri di bawah perkara 76A PP. Dalam berbuat demikian, Parlimen atau Badan Perundangan Negeri tidak berselindung atau tidak secara tidak langsung menceroboh batas-batas terlarang. Dengan wajarnya, Akta memperuntukkan bagi hal perkara yang Parlimen mempunyai kuasa untuk menggubal manakala Enakmen memperuntukkan bagi hal perkara yang Badan Perundangan Pulau Pinang mempunyai kuasa untuk menggubal. Akta dan Enakmen tidak tidak sah (lihat perenggan 77–79).]

Notes

For cases on federal and state law in general, see 3(2) *Mallal's Digest* (5th Ed, 2015) paras 2618–2625.

Cases referred to

A Reference As To The Validity of Section 5(a) of the Dairy Industry Act, In re; Canadian Federation of Agriculture v A-G for Quebec [1951] AC 179, PC (refd)

Ah Thian v Government of Malaysia [1976] 2 MLJ 112, FC (refd)

Attorney-General for Ontario v Reciprocal Insurers and others (Attorney-General for Canada, intervener) [1924] AC 328, PC (refd)

Badan Peguam Malaysia v Kerajaan Malaysia [2008] 2 MLJ 285, FC (refd)

Citizens Insurance Co of Canada v Parsons; Queen Insurance Co v Parsons [1881–85] All ER Rep 1179; (1881) 7 App Cas 96, PC (refd)

Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29, FC (refd)

Deere (John) Plow Co Ltd v Wharton [1915] AC 330, PC (refd)

Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697, SC (refd)

East Union (Malaya) Sdn Bhd v Government of State of Johore & Government of Malaysia [1980] 2 MLJ 143, FC (refd)

Elel Hotels and Investments v Union of India (1989) SCR (2) 880, SC (refd)

Fathul Bari bin Mat Jahya & Anor v Majlis Agama Islam Negeri Sembilan & Ors [2012] 4 MLJ 281, FC (refd)
Gallagher v Lynn [1937] 3 All ER 598; [1937] AC 863, HL (refd)
Gerald Fernandez v Attorney-General, Malaysia [1970] 1 MLJ 262, FC (refd)
Godfrey Phillips (I) Ltd & Anr v State of UP & Ors (2005) 2 SCC 515, SC (refd)
Goverment State of Penang & Anor v Government of Malaysia & Anor [2014] 6 MLJ 322, FC (refd)
Gujarat Ambuja Cements Ltd & Anr v Union of India & Anr (2005) 4 SCC 214, SC (refd)
Harakchand Ratanchand Banthia v Union of India And Ors (1969) 2 SCC 166, SC (refd)
Hashim bin Saud v Yahaya bin Hashim & Anor [1973] 2 MLJ 85 (refd)
Jilubhai Nanbhai Khachar Etc v State of Gujarat & Ors AIR 1995 SC 142, SC (refd)
KC Gajapati Narayana Deo v The State of Orissa AIR 1953 Ori 185; (1954) SCR 1, HC (refd)
Karnataka Bank Ltd v State of Andhra Pradesh and others (2008) 2 SCC 254, SC (refd)
Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals [1997] 3 MLJ 23, CA (refd)
Kulasingam v PP [1978] 2 MLJ 243, FC (refd)
Mamat bin Daud & Ors v Government of Malaysia [1988] 1 MLJ 119, SC (refd)
Mark Koding v PP [1982] 2 MLJ 120, FC (refd)
Minister of Home Affairs and another v Fisher and another [1979] 3 All ER 21; [1980] AC 319, PC (refd)
Nordin bin Salleh v Kerajaan Negeri Kelantan & Anor [1993] 3 MLJ 344, SC (refd)
Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & Another Appeal [2005] 3 MLJ 97, FC (refd)
Prem Chand Jain & Anr v RK Chhabra 1984 SCR (2) 883, SC (refd)
PP v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116 (refd)
PP v Gan Boon Aun [2017] 3 MLJ 12, FC (refd)
PP v Pung Chen Choon [1994] 1 MLJ 566, SC (refd)
PP v Su Liang Yu [1976] 2 MLJ 128 (refd)
PP v Voon Nyuk Tze & Anor [1965] 2 MLJ 131, CA (refd)
Rethana v Government of Malaysia [1984] 2 MLJ 52, FC (refd)
Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications [2009] 6 MLJ 354, FC (refd)
Syarikat Banita Sdn Bhd v Government of State of Sabah [1977] 2 MLJ 217, FC (refd)
The State of Bihar v Maharajadhiraja Sir Kameshwar (1952) 1 SCR 889, SC (refd)
The State of Rajasthan v Shri G Chawla and Dr Pohumal (1959) AIR 544, SC (refd)

A *Union Colliery Co of British Columbia Ltd v Bryden* [1899] AC 580, PC (refd)
Union of India & Ors v Shah Goverdhan L Kabra Teachers (2002) 8 SCC 228; (2002) 7 SCALE 435, SC (refd)
Yeoh Tat Thong v Government of Malaysia & Anor [1973] 2 MLJ 86 (refd)

B **Legislation referred to**

British North America Act 1867 [UK] ss 91, 92
Chief Minister of Penang (Incorporation) Enactment 2009 ss 3, 4, 5
Companies Act 1965 (repealed by Companies Act 2016)
Companies Act 2016
C Constitution of India [IND] art 246, Seventh Schedule
Courts of Judicature Act 1964 ss 83, 84
Employees' Social Security Act 1969
Federal Constitution arts 4, 4(3), (4), 8(1), 10, 13(1), 71(4), 74, 74(1), (2), (4), 76, 76A, 128, 128(1), (1)(a), (2), 130, 160, Ninth Schedule,
D Federal List, items 5, 8, 8(c), State List, Concurrent List
Firearms (Increased Penalties) Act 1971
Government of India Act 1935 [UK]
Incorporation (State Legislatures Competency) Act 1962 s 3, First Schedule, item 5
E Kelantan Council of Religion and Malay Custom Enactment 1966 s 73
Land Acquisition Act 1960 ss 8, 12, 38, 68, 68A
Laws of the State of Penang arts 7(9), 9(1)
Syariah Criminal (Negeri Sembilan) Enactment 1992 s 53

F *Gopal Sri Ram (T Gunaseelan, Balwant Singh and David Yii with him) (Balwant Singh & Co) for the petitioner.*
Malik Imtiaz Sarwar (Siti Fatimah Talib, Charanjit Singh a/l Mahinder Singh, Chan Wei June and Surendra Ananth with him) (Pulau Pinang Legal Advisor Office) for the first, third, fourth and sixth respondents.
G *Alice Loke Yee Ching (Shaiful Nizam bin Shahrin with her) (Federal Counsel, Attorney General's Chambers) for the second respondent.*
Karin Lim Ai Ching (Dominic Pillai with her) (Presgrave Matthews) for the fifth respondent.

H **Raus Sharif Chief Justice (delivering judgment of the court):**

INTRODUCTION

[1] The petitioner was granted leave by this court on 9 August 2016, pursuant to art 4(4) of the Federal Constitution, to bring this petition against
I the respondents. The petitioner seeks the following reliefs:

(a) a declaration that the Chief Minister of Penang (Incorporation) Enactment 2009 ('the Enactment 9') or alternatively ss 3, 4 and 5 of the Enactment 9 is/are invalid and void as being a law which the State

Legislature of the State of Penang has no power to make; and

(b) a declaration that the Incorporation (State Legislatures Competency) Act 1962 (Act 380), or alternatively s 3 and item 5 of the First Schedule thereof, in so far as it allows the incorporation of the Office of the Chief Minister of Penang with perpetual succession and permits the corporation to engage in commercial activities is/are invalid and void as being a law which Parliament has no power to make.

MATERIAL FACTS

[2] The petitioner was the registered owner of ten parcels of land in Balik Pulau, Mukim 6, South West District, Penang ('the lands').

[3] The lands were acquired by the Penang State Government ('the first respondent') through the Director of Lands and Mines, Penang ('the third respondent') and the Land Administrator of the South West District of Penang ('the fourth respondent'). The lands were acquired for a public purpose under s 8 of the Land Acquisition Act 1960 ('the LAA'), pursuant to a declaration of proposed acquisition dated 27 August 2009 published in the Penang State *Gazette*.

[4] On 25 May 2010, the fourth respondent conducted an enquiry as required under s 12 of the LAA, and offered compensation in the sum of RM40,161,639.50 to the petitioner. The petitioner accepted the said compensation under protest. On 27 October 2010, the fourth respondent took possession of the lands from the petitioner.

[5] Thereafter, the petitioner applied to the fourth respondent to refer its objection as to the amount of compensation awarded to the High Court, under s 38 of the LAA. The proceedings were registered in the Penang High Court as Land Reference No 15–122 of 2010.

[6] On 2 March 2011, the High Court after hearing the parties ordered that the compensation sum be increased by RM4,803.195.50, with interest at the rate of 8%pa from 27 October 2010 until full payment. Thus, the total sum of compensation awarded for the acquisition of the lands was RM44,964,837, which was paid in full to the petitioner.

[7] On 31 October 2013, the fourth respondent alienated the lands to the fifth respondent, a body corporate established under the Chief Minister of Penang (Incorporation) Enactment 2009 ('the Enactment 9'). The lands were alienated with the express condition that the lands were to be 'used for educational purposes only'.

[8] On 3 March 2014, the petitioner as the plaintiff filed Civil Suit No 21NCVC- 4–03 of 2014 in the Penang High Court ('the civil suit'), naming the first, third, fourth and fifth respondents as defendants. The petitioner challenged the validity of the acquisition and sought the return of the lands, alleging that the acquisition was done mala fide and not for a public purpose. The petitioner prayed, among others, for a declaration that the acquisition of the lands was invalid, null and void.

[9] The defendants in the civil suit have applied to strike out the same on the ground that the petitioner lacks locus standi by virtue of s 68 of the LAA. The proceedings in the civil suit are still ongoing before the High Court.

[10] The petitioner took the position that the constitutionality of Act 380 and Enactment 9 cannot be dealt with by the Penang High Court. Thus, the petitioner applied for leave to commence the present petition pursuant to arts 4(4) and 128(1)(a) of the Federal Constitution. The Government of Malaysia (the second respondent) and the Chief Minister of Penang (the sixth respondent) were included as respondents in this petition.

THE PETITIONER'S CASE

[11] It is the petitioner's case that Act 380 is ultra vires the Federal Constitution and a law that Parliament did not have the power to enact. The petitioner contended that:

(a) art 76A of the Federal Constitution provides that Parliament can authorise State Legislatures to make laws with respect to matters enumerated in the Federal List. Item 8(c) of the Federal List provides for the incorporation of corporations other than municipal corporations. Applying the *ejusdem generis* rule, 'corporation' in item 8(c) is interpreted to mean a corporation aggregate formed under the Companies Act 1965/2016. It does not include the incorporation of corporations sole such as the Chief Minister. Thus, Act 380 is invalid insofar as it authorises State Legislatures to make law relating to the incorporation of the Chief Minister; and

(b) Act 380 contravenes art 71(4) of the Federal Constitution, which provides for instances when Parliament may legislate in respect of essential provisions in a State Constitution. Since the office of the Chief Minister was established under the state constitution, it is for the state constitution alone to spell out the status, capacity, nature and powers of the Chief Minister. Parliament does not have the power to allow State Legislatures to make law contrary to the state constitution.

[12] The petitioner further contended that the Enactment 9, or alternatively ss 3, 4 and 5 thereof, is/are invalid and void as being a law which the Penang State Legislature has no power to make. It was argued on behalf of the petitioner that:

(a) the State Legislature only has the power to pass laws to establish municipal corporations;

(b) the State Legislature does not have power to enact laws contrary to the state constitution;

(c) Enactment 9 provides for the fifth respondent to engage in business. This is in contravention of art 7(9) of the Penang State Constitution, which states that the Chief Minister shall not hold any office of profit nor actively engage in any commercial enterprise;

(d) Enactment 9 provides for the fifth respondent to enter into contracts, and acquire, hold or dispose of property. This renders otiose art 9(1) of the Penang State Constitution, which states that the State has power to acquire, hold and dispose of property and to make contracts. Since the Chief Minister will not be answerable to the State Legislature and may act independently of the State Executive Council, Enactment 9 circumvents the Penang State Constitution; and

(e) in pith and substance, Enactment 9 purports to vest the Chief Minister of Penang with greater status and power than that granted by the Penang State Constitution. As such, Enactment 9 is a colourable legislation.

[13] In reply to the respondents' position that s 68A of the LAA precludes the petitioner from seeking to invalidate the alienation of the lands by reference to their subsequent disposal, the petitioner contended that the said section is invalid. It was submitted that s 68A of the LAA is ultra vires art 13(1) read with art 8(1) of the Federal Constitution and contrary to the right of access to justice.

THE RESPONDENTS' CASE

[14] In response, the learned senior federal counsel submitted on behalf of the second respondent that the petitioner had premised the present challenge on art 4(3) of the Federal Constitution, invoking the original jurisdiction of this court under art 128(1)(a). It was asserted that the sole permissible ground of challenge is that the Act or Enactment was not within the legislative competency of Parliament or the State Legislature, because it relates to a matter that Parliament or the State Legislature had no power to make laws.

[15] The second respondent's position is that Act 380 falls within the legislative power of Parliament. It was contended that:

(a) the incorporation of bodies and persons is a matter falling within item 8 of the Federal List. Article 76A of the Federal Constitution allows Parliament to extend its legislative powers to the state to legislate on such matters; and

(b) Act 380 allows State Legislatures to make laws in respect of incorporation, subject to the restriction that such incorporation must relate to matters listed in the First Schedule of that Act. The incorporation of the Chief Minister is provided for in item 5 of the First Schedule.

[16] Further or in the alternative, the second respondent contended that a decision on the validity of Act 380 is unnecessary and unwarranted in the circumstances. It was contended that the decision of this court on Act 380 would have no bearing on the core issues in the civil suit, which concern the validity of the acquisition and the applicability of s 68A of the LAA.

[17] The first, third, fourth and sixth respondents contended at the outset that in proceedings under arts 4(3) and 128(1)(a) of the Federal Constitution, the essential complaint must be that the legislative body does not have power to enact the impugned law. It was contended that this court is not empowered to consider complaints that the impugned law contravened specific provisions of the Federal Constitution or State Constitution.

[18] It was further contended that Parliament is empowered to enact laws relating to the incorporation of persons and bodies. The position of the first, third, fourth and sixth respondents may be summarised thus:

(a) entries in the Lists are merely heads of legislation enumerating broad and comprehensive categories. The entries should be interpreted broadly and their words given the widest amplitude, so as to cover all cognate, subsidiary, ancillary or incidental matters;

(b) art 74(4) states that the generality of expressions used in the Lists are not limited by specific expressions. The utility of rules of construction, including the *ejusdem generis* rule, is limited in interpreting entries in the Lists;

(c) the *ejusdem generis* rule applies when particular words pertaining to a class, category or genus are followed by general words. The rule does not apply to item 8; and

(d) based on these principles, the incorporation of bodies and persons is a matter falling within item 8 of the Federal List.

[19] It was asserted that Parliament is empowered to delegate that legislative power to the State Legislative Assemblies under art 76A of the Federal

Constitution, and did so through Act 380. There is no question, it was asserted, as to the competency of the Penang State Legislative Assembly to enact Enactment 9, which falls squarely within the First Schedule of Act 380. It was further highlighted that the implications of the reliefs prayed for in this petition are far-reaching, for the incorporation of the Chief Minister is not peculiar to Penang; other states likewise have enactments conferring a general power for the incorporations of the respective Chief Ministers or Menteri-Menteri Besar.

[20] The position of the fifth respondent is largely similar to that of the first, third, fourth and sixth respondents. The fifth respondent also added that, while challenges to Enactment 9 on the basis that it is ultra vires the Penang State Constitution lies beyond the scope of this petition, in any event, Enactment 9 does not contravene the State Constitution. It was contended that:

(a) the Chief Minister does not by virtue of Enactment 9 hold an 'office of profit' as defined in art 160 of the Federal Constitution;

(b) the power given to the fifth respondent under Enactment 9 does not fall foul of the prohibition on 'commercial enterprise' in the Penang State Constitution, which refers to commercial activities for personal gain; and

(c) under Enactment 9, the powers of the fifth respondent are 'subject to any written law and the approval of the State Executive Council'. The Chief Minister or the fifth respondent would not be circumventing the State Constitution by acting independently.

[21] The fifth respondent further contended that the present petition is an attempt by the petitioner to avoid the application of s 68A of the LAA. It was contended that since the petitioner's complaint is against the constitutionality of s 68A, the issue should be raised in the High Court; the Petitioner has no real grouse against either Act 380 or Enactment 9.

SCOPE OF ARTS 4(3), 4(4) AND 128(1) OF THE FEDERAL CONSTITUTION

[22] It is necessary to define clearly the scope of the present proceedings at the outset. As stated earlier, this petition was filed pursuant to art 4(4) of the Federal Constitution. Clauses (3) and (4) of art 4 read as follows:

4 Supreme law of the Federation

(1) ...

(2) ...

(3) The validity of any law made by Parliament or the Legislature of any State

shall not be questioned *on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws*, except in proceedings for a declaration that the law is invalid on that ground or —

(a) if the law was made by Parliament, in proceedings between the Federation and one or more States;

(b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.

(4) Proceedings for a declaration that a law is invalid *on the ground mentioned in Clause (3)* (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause. (Emphasis added.)

[23] The jurisdiction of this court, governed by the Federal Constitution, is of four kinds: appellate jurisdiction, exclusive original jurisdiction under art 128(1), referral jurisdiction under art 128(2), and advisory jurisdiction under art 130 (*Kulasingam v Public Prosecutor* [1978] 2 MLJ 243 at p 244). In filing this petition, the petitioner seeks to invoke the exclusive original jurisdiction of this court under art 128(1)(a) of the Federal Constitution:

128 Jurisdiction of Federal Court

(1) The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction —

(a) *any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws*; and

(b) disputes on any other question between States or between the Federation and any State. (Emphasis added.)

[24] The type of suit in which a challenge to the validity of a legislation can be made depends on the ground of invalidity put forward (KC Vohrah, PTN Koh, PSW Ling (eds), *Sheridan & Groves The Constitution of Malaysia* (5th Ed, Kuala Lumpur: Malayan Law Journal, 2004)). The jurisdiction of the courts to declare a law invalid on a particular ground was eloquently articulated by Suffian LP in an oft-quoted passage in *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 at p 113, which is worth reproducing in full:

Under our Constitution written law may be invalid on one of these grounds:

(1) in the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter which respect to which the State legislature has no power to make law, art 74; or

(2) in the case of both Federal and State written law, because it is inconsistent with the Constitution, see art 4(1); or

(3) in the case of State written law, because it is inconsistent with Federal law, art 75.

The court has power to declare any Federal or State law invalid on any of the above three grounds.

The court's power to declare any law invalid on grounds (2) and (3) is not subject to any restrictions, and may be exercised by any court in the land and in any proceeding whether it be started by government or by an individual.

But the power to declare any law invalid on ground (1) is subject to three restrictions prescribed by the Constitution.

First, cl (3) of art 4 provides that the validity of any law made by Parliament or by a State Legislature may not be questioned on the ground that it makes provision with respect to any matter with respect to which the relevant Legislature has no power to make law, except in three types of proceedings as follows:

(a) in proceedings for a declaration that the law is invalid on that ground; or

(b) if the law was made by Parliament, in proceedings between the Federation and one or more states; or

(c) if the law was made by a State Legislature, in proceedings between the Federation and that State.

It will be noted that proceedings of types (b) and (c) are brought by government, and there is no need for any one to ask specifically for a declaration that the law is invalid on the ground that it relates to a matter with respect to which the relevant legislature has no power to make law. The point can be raised in the course of submission in the ordinary way. Proceedings of type (a) may however be brought by an individual against another individual or against government or by government against an individual, but whoever brings the proceedings must specifically ask for a declaration that the law impugned is invalid on that ground.

Secondly, cl (4) of art 4 provides that proceedings of the type mentioned in (a) above may not be commenced by an individual without leave of a judge of the Federal Court and the Federation is entitled to be a party to such proceedings, and so is any state that would or might be a party to proceedings brought for the same purpose under type (b) or (c) above. This is to ensure that no adverse ruling is made without giving the relevant government an opportunity to argue to the contrary.

Thirdly, *cl (1) of art 128 provides that only the Federal Court has jurisdiction to determine whether a law made by Parliament or by a State Legislature is invalid on the ground that it relates to a matter with respect to which the relevant Legislature has no power to make law. This jurisdiction is exclusive to the Federal Court, no other court has it. This is to ensure that a law may be declared invalid on this very serious ground only*

after full consideration by the highest court in the land. (Emphasis added.)

EXCLUSIVE JURISDICTION OF THE FEDERAL COURT

[25] It is clear from the above that arts 4(3), 4(4) and 128(1)(a) apply only where the validity of a law is challenged on the ground that it 'makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws'. The matters with respect to which Parliament or the State Legislature has power to make law are provided for in arts 74, 76 and 76A of the Federal Constitution. The meaning of 'matter' for the purposes of arts 4 and 128 was explained by this court in *Syarikat Banita Sdn Bhd v Government of State of Sabah* [1977] 2 MLJ 217 at p 218:

> ... the word 'matter' in cl (3) of art 4 has the same meaning as the word 'matters' in cl (2) of art 74, that as the impugned subsection deals with a state subject, ie a matter with respect to which the Sabah Legislature has power to make law, the proposed challenge to the validity of the new subsection does not come within cl (4) of art 4 or cl (1)(a) of art 128.

[26] The central question is whether the *subject matter* of the impugned law comes within the matters enumerated in the enabling constitutional provision. The division of subject matters between Parliament and the State Legislature are based on the legislative lists in the Ninth Schedule of the Federal Constitution:

(i) under art 74(1), Parliament has power to make law with respect to matters in the Federal List or the Concurrent List (Lists 1 and 3 of the Ninth Schedule);

(ii) under art 74(2), the State Legislature has power to make law with respect to matters in the State List or the Concurrent List (Lists 2 and 3 of the Ninth Schedule);

(iii) under art 76, in certain circumstances, Parliament may exceptionally make law with respect to matters in the State List; and

(iv) under art 76A, in certain circumstances, the State Legislature may exceptionally make law with respect to matters in the Federal List.

[27] Thus, the applicability of arts 4(3), 4(4) and 128(1)(a) is confined to situations where Parliament or the State Legislature has strayed beyond matters within their legislative competence based on the constitutional provisions in (i)–(iv) above. The ambit and operation of arts 4(3), 4(3) and 128 were neatly summarised by Azmi LP in *Yeoh Tat Thong v Government of Malaysia & Anor* [1973] 2 MLJ 86 at p 87:

> In my view, cll 3 and 4 of art 4 have reference only to suits where a challenge is made to the validity of primary legislation on the ground that Parliament has made a law which is on the State List, (see Schedule 9 of the Constitution) or on the ground that a state has made a law which is within the Federal List. It is only in such suits (except where the proceedings are between the Federation and one or more States) that leave under cl 4 is necessary; and in view of art 128 the Federal Court has exclusive jurisdiction to determine such question. Leave referred to in cl 4 is therefore leave to bring the matter before the Federal Court ... Apart from all that, it is my view that the High Court and indeed even subordinate courts have jurisdiction to determine any question affecting the provisions of the Federal Constitution, except where the matter comes under art 4.

[28] Articles 4(3), 4(4) and 128(1)(a) have been used to challenge the validity of laws on the basis that:

(a) Parliament made law on a matter not in the Federal List (*Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119);

(b) the State Legislature made law on a matter not in the State List (*Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications* [2009] 6 MLJ 354; *Fathul Bari bin Mat Jahya & Anor v Majlis Agama Islam Negeri Sembilan & Ors* [2012] 4 MLJ 281); and

(c) Parliament, in exercising the power to make law on matters in the State List under art 76, failed to satisfy the conditions specified therein (*East Union (Malaya) Sdn Bhd v Government of State of Johore & Government of Malaysia* [1980] 2 MLJ 143; *Goverment State of Penang & Anor v Government of Malaysia & Anor* [2014] 6 MLJ 322).

[29] However, the exclusive jurisdiction of this court does not extend to *all* matters of constitutionality. The distinctive nature of challenges within the scope of arts 4(4) and 128(1) was explained by this court in *Syarikat Banita* at p 218:

> *The validity of the new subsection is to be challenged not on the ground that it deals with a matter with respect to which the Sabah legislature has no power to make law* (on the contrary, as already stated, it was conceded that it deals with a matter within the competence of that Legislature). *It is to be challenged on the ground that it is contrary to several provisions of the constitution. The fact, if such be it, that it is so contrary does not mean that it deals with a matter with respect to which the State Legislature has no power to make law*. (Emphasis added.)

[30] The effect of arts 4(4) and 128(1)(a) is illustrated by the facts of *Ah Thian* itself. There, the applicant sought to challenge the validity of the Firearms (Increased Penalties) Act 1971 on the ground that it is inconsistent with art 8(1) of the Federal Constitution. Noting that the impugned Act relates to matters within the Federal List, this court held that arts 4(4) and 128(1) did

not apply. Suffian LP said (at p 113):

> The applicant says that the Act is invalid because it is inconsistent with the Constitution, ie on ground (2) set out in para 9 above. *Therefore cl (4) of art 4 and cl (1) of art 128 do not apply and the point may be raised in the ordinary way in the course of submission, and determined in the High Court, without reference to the Federal Court*, and there is no need for leave of a judge of the Federal Court.
>
> True the learned judge has power under s 48 of the Courts of Judicature Act 1964 (LM Act 91) to stay the proceedings before him and refer a matter like this to the Federal Court. He has not however done so in this case (this is an application by the accused). *But in any event matters like this as a matter of convenience and to save the parties time and expense are best dealt with by him in the ordinary way, and the aggrieved party should be left to appeal in the ordinary way to the Federal Court*. (Emphasis added.)

[31] The rationale for construing strictly the limits of the exclusive original jurisdiction of this court was explained in *Rethana v Government of Malaysia* [1984] 2 MLJ 52. In that case, the Employees' Social Security Act 1969 was challenged not on the basis that Parliament had no power to enact it, but on the basis of inconsistencies with provisions in the Federal Constitution. This court held that since the subject matter of the Act is covered by the Federal List, the suit is within the original jurisdiction of the High Court and ought not be litigated at the first instance before this court. Per Mohamed Azmi FJ (as His Lordship then was) at p 54:

> Under our Constitution, the Federal Court is an appellate court and its exclusive original jurisdiction is limited. In my opinion, *this particular original jurisdiction of the Federal Court conferred by art 128(1)(a) read with s 45 of the Courts of Judicature Act 1964 should be strictly construed* and confined to cases where the validity of any law passed by Parliament or any State Legislature is being challenged on the ground that Parliament has legislated on a matter outside the Federal List or Concurrent List; or a State Legislature has enacted a law concerning a matter outside the State List or the Concurrent List as contained in the ninth Schedule to the Federal Constitution. *To extend the exclusive original jurisdiction of the Federal Court to matters which are not expressly provided by the Constitution would apart from anything else, deprive aggrieved litigants of their right of appeal to the highest court in the land.* (Emphasis added.)

[32] To summarise, the following principles can be distilled from the line of authorities above in relation to the scope and operation of arts 4(3), 4(4) and 128(1)(a) of the Federal Constitution:

(i) arts 4(3), 4(4) and 128(1)(a) apply only to proceedings where the validity of a legislation is specifically challenged on the ground that it deals with a matter with respect to which the relevant legislative body has no power to make law;

(ii) an impugned law deals with a matter with respect to which the relevant legislative body has no power to make law if:

(a) Parliament made law on a matter not within the Federal List;

(b) the State Legislature made law on a matter not within the State List;

(c) Parliament made law on a matter within the State List pursuant to art 76, but failed to comply with the requirements in the said Article; or

(d) the State Legislature made law on a matter within the Federal List pursuant to art 76A(1), but failed to comply with the requirements in the said Article;

(iii) a challenge to the validity of a legislation on that ground is subject to the following restrictions:

(a) it may only be commenced in three types of proceedings (art 4(3)):

(aa) proceedings for a declaration that a law is invalid on that ground;

(ab) if the law was made by Parliament, proceedings between the Federation and one or more States; and

(ac) if the law was made by a State Legislature, proceedings between the Federation and that State;

(b) proceedings of type (iii)(a)(aa) above may only be commenced with the leave of the Federal Court (art 4(4)). Leave is not required for the other two types of proceedings in (iii)(a)(ab) and (ac); and

(c) the Federal Court has exclusive original jurisdiction to determine the matter (art 128(1)(a)).

[33] A different construction of the scope of arts 4(4) and 128(1)(a) appears to have been adopted in a handful of cases. The ground of challenge that a law relates to 'matters with respect to which the legislative body has no power to make laws' was given a wider interpretation, extending to challenges that an Act contravenes the fundamental liberties provisions in the Federal Constitution and that a State Enactment is inconsistent with Federal law. We observe that the cases in favour of the wider interpretation do not offer a clear juridical foundation for the alternative construction, and are not altogether reconcilable with the dominant position settled by the line of authorities discussed earlier.

[34] It is not insignificant that the position in *Ah Thian* (see also *Gerald*

Fernandez v Attorney-General, Malaysia [1970] 1 MLJ 262, *Syarikat Banita* and *East Union* was elucidated by none other than Tun Suffian LP, who, having helped draft the Malayan Constitution in 1956–7 and its predecessor the Federation of Malaya Agreement 1948, was well-placed to understand the intricacies of our constitutional provisions (Tun M Suffian, *Four Decades in the Law — Looking Back* in FA Trinidade and HP Lee, *The Constitution of Malaysia: Further Perspectives and Developments* (Singapore: Oxford University Press, 1986)). We see no reason to depart from the position in *Ah Thian* as restated earlier. To avoid confusion, we would thus consider that the reasoning in the handful of cases adopting the wider approach are best confined to the peculiar facts and exigencies therein.

GENERAL JURISDICTION OF THE HIGH COURT

[35] Challenges to the validity of legislation on grounds other than the specific ground in arts 4(4) and 128(1)(a) are available to all litigants in all proceedings (KC Vohrah, PTN Koh, PS WLing (eds), *Sheridan & Groves The Constitution of Malaysia* (5th Ed, Kuala Lumpur: Malayan Law Journal, 2004) at p 46). The High Court is competent to hear such challenges, for the general scheme of the Federal Constitution is to empower the High Court to pronounce on the constitutionality of federal and state laws (*Gerald Fernandez v Attorney-General, Malaysia* [1970] 1 MLJ 262 at p 264).

[36] It bears emphasis and repetition that not all matters of constitutionality come under the exclusive jurisdiction of the Federal Court. The Federal Court is not a constitutional court, but the final arbiter on the meaning of constitutional provisions (A Harding, *Law, Government and the Constitution in Malaysia* (Kuala Lumpur, Malayan Law Journal: 1996) at p 138). All courts, not just the Federal Court, have the power to interpret the Constitution (per Tun M Suffian, *The Judiciary — During the First Twenty Years of Independence* in Tun M Suffian, HP Lee, FA Trinidade (eds), *The Constitution of Malaysia, Its Development: 1957–1977* (Kuala Lumpur, Oxford University Press: 1978) at p 237). Only challenges as to the *competence* of the legislative body to enact a law fall within the original jurisdiction of the Federal Court; all other grounds of challenge to the *constitutional validity* of a law are within the jurisdiction of the High Court.

[37] While s 84 of the Courts of Judicature Act 1964 allows the High Court to refer questions regarding the effect of any provision of the Constitution to the Federal Court, the High Court is not obliged to do so and may dispose of the questions (Tan Sri Mohamed Suffian bin Hashim, *An Introduction to the Constitution of Malaysia* (Kuala Lumpur: Jabatan Chetak Kerajaan, 1972) at p 96; *Hashim bin Saud v Yahaya bin Hashim & Anor* [1973] 2 MLJ 85 at p 85). Indeed, this court has expressed a preference for the High Court to determine

constitutional questions itself in *Mark Koding v Public Prosecutor* [1982] 2 MLJ 120 at pp 123–124:

> Secondly, we would observe that *it would have been better if the learned judge had not referred this matter to us but instead had himself decided the constitutional questions which arose (he had jurisdiction to do so: Fernandez v Attorney-General [1970] 1 MLJ 262 at p 264*) and decided the case one way or the other. If he had done that and there were an appeal to us, the whole matter would have been disposed of in two steps.
>
> By referring this matter to us without deciding it one way or another, should there be an appeal from his decision on the charge, this matter would come back to us a second time, and thus will have to be disposed of in four steps: causing delay and additional expense, instead of helping in the words of s 48(2) of the Courts of Judicature Act, towards the speedy and economical final determination of these proceedings. (Emphasis added.)

[38] As such, it is clear that arts 4(3), 4(4) and 128(1)(a) do not apply to challenges to the validity of legislation on any other ground than where a legislative body has made law on matters beyond its legislative competence. These other grounds include challenges on the basis that the law is inconsistent with certain provisions in the Federal or State Constitution, and that a State Enactment is inconsistent with Federal law. Challenges on other grounds are not subject to any of the restrictions above, and the High Court has jurisdiction to determine the matter.

SCOPE OF THIS PETITION

[39] Turning to the grounds of invalidity raised in the present petition, we note that the petitioner has contended that Parliament lacked legislative competence to enact Act 380, which relates to matters not covered in the Federal List. This ground falls squarely within the scope of proceedings commenced under arts 4(4) and 128(1)(a). However, other grounds of invalidity were also submitted by the petitioner, broadly:

(a) Parliament does not have the power to allow State Legislatures to make law contrary to the State Constitution; and

(b) the State Legislature does not have the power to enact Enactment 9, which contravenes various provisions in the Penang State Constitution.

[40] A similar situation where some, but not all, grounds of invalidity raised fell within the scope of arts 4(4) and 128(1)(a) was dealt with by the then Supreme Court in *Nordin bin Salleh v Kerajaan Negeri Kelantan & Anor* [1993] 3 MLJ 344. There, the applicant applied for leave to commence proceedings under art 4(4) for declarations that s 73 of the Kelantan Council of Religion and Malay Custom Enactment 1966 was invalid on various grounds. The Supreme Court granted leave in respect of the declaration sought that the

Kelantan State Legislature had no power to enact the impugned section, which relates to a matter not in the State List but in the Federal List. The Supreme Court refused leave in respect of the declaration sought that the section was inconsistent with art 10 of the Federal Constitution (at p 351):

> *As para (c) of the notice of motion was to seek a declaration that s 73 of the Enactment was void on the grounds that it was inconsistent with the provisions of art 10(1)(a) of the Constitution and not on the grounds that it dealt with a matter with respect to which the Kelantan Legislature had no power to deal with, the High Court has jurisdiction in the matter and the leave of a judge of the Supreme Court was not required. As for the prayers in paras (a) and (b) of the notice of motion, I was satisfied that the applicant had an arguable case in that the application is not frivolous. I am of the view that the Enactment is a post-Merdeka legislation and the intended challenge is on the competency of the Kelantan State Legislature to enact the legislation.* The two prayers are not merely grounded on the impugned law being inconsistent with the Constitution, also the validity of the legislation is to be challenged on the grounds that it deals with a matter with respect to which the State Legislature has no power to make law. As such, leave of a judge of the Supreme Court is required under art 4(4) and the applicant should be allowed to canvass his case before the full court on the constitutionality and validity of that section in the said Enactment. I therefore made an order granting leave to the applicant to file proceedings in the Supreme Court for declarations in terms of prayers (a) and (b) of the said notice of motion. (Emphasis added.)

[41] For the purposes of this petition, we will thus confine our determination as to the validity of Act 380 and Enactment 9 to whether:

(a) Act 380 relates to a matter within the legislative competence of Parliament; and

(b) Enactment 9 relates to a matter within the legislative competence of the Penang State Legislature.

[42] Other grounds of invalidity raised by the petitioner lie beyond the scope of a petition filed under arts 4(4) and 128(1)(a). We also note that the petitioner has not sought for a declaration of invalidity in respect of s 68A of the LAA; neither is the validity of s 68A challenged on the ground that it concerns a matter with respect to which Parliament had no power to legislate. These other submissions may be pursued before the High Court, which has jurisdiction to determine the validity of the impugned laws on those grounds.

INTERPRETATION OF LEGISLATIVE LISTS

[43] The starting point for determining legislative competence is art 74 of the Federal Constitution. The law-making powers of Parliament and the State Legislatures are provided for respectively in cll (1) and (2) of art 74:

> 74 Subject matter of federal and State laws

(1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).

(2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.

[44] Article 76A authorises Parliament to delegate its legislative power on a matter in the Federal List to the State Legislatures:

76A Power of Parliament to extend legislative powers of States

(1) It is hereby declared that the power of Parliament to make laws with respect to a matter enumerated in the Federal List includes power to authorize the Legislatures of the States or any of them, subject to such conditions or restrictions (if any) as Parliament may impose, to make laws with respect to the whole or any part of that matter.

[45] The entry in the Federal List pertinent to the present case is item 8(c), which reads:

8 Trade, commerce and industry, including —

(c) incorporation, regulation and winding up of corporations other than municipal corporations (but including the municipal corporation of the federal capital); regulation of foreign corporations; bounties on production in or export from the Federation;

[46] To determine whether Act 380 relates to a matter with respect to which Parliament had power to make laws, the central issue is whether the incorporation of the Chief Minister of Penang falls within the meaning of 'incorporation' in item 8(c).

PRINCIPLES OF INTERPRETATION

[47] In a challenge to the constitutionality of a provision, there is a presumption of constitutionality and the burden of proof lies on the party seeking to establish its invalidity (*Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116, *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128, *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566 and *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12).

[48] It is trite that a constitution is *sui generis* and calls for principles of interpretation of its own. The constitution should be construed broadly and not pedantically, with less rigidity and more generosity than statutes. Regard

must be given to the language used (*Minister of Home Affairs and another v Fisher and another* [1979] 3 All ER 21; [1980] AC 319, *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697, *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285 and *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & Another Appeal* [2005] 3 MLJ 97). Per Raja Azlan Shah AG LP (as His Royal Highness then was) in the leading case of *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 at p 32:

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way — 'with less rigidity and more generosity than other Acts' (see *Minister of Home Affairs v Fisher* [1979] 3 All ER 21. A constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation.

[49] Similar to the structure of our Federal Constitution, the Indian Constitution provides for the legislative powers of the Union and State Parliaments in art 246, and delineates the specific matters within the respective legislative competence of the Union and the States by way of three legislative lists in the Seventh Schedule. The predecessor of the Indian Constitution, the Government of India Act 1935, was in turn based on the structure of the British North America Act 1867, which likewise lists out the matters within the respective competence of the Dominion Parliament and the Provincial Legislatures of Canada in ss 91 and 92 thereof. Thus, we find Indian and Canadian authorities to be of considerable assistance in shedding light on the nature of the entries and their principles of interpretation.

[50] Parliament and the State Legislatures derive their legislative power from art 74 of the Federal Constitution. The function of the entries in the Legislative Lists in the Ninth Schedule is not to confer powers of legislation, but merely to demarcate the fields in which legislative bodies operate. In *Deere (John) Plow Co Ltd v Wharton* [1915] AC 330, the Privy Council explained the character of the entries in ss 91 and 92 of the British North America Act based on their drafting history:

> ... it is necessary to realize the relation to each other of sections 91 and 92 and the character of the expressions used in them. The language of these sections and of the various heads which they contain obviously cannot be construed as having been intended to embody the exact disjunctions of a perfect logical scheme. The draftsman had to work on the terms of a political agreement ... if there is at points obscurity in language, this may be taken to be due, not to uncertainty about general principle, but to that difficulty in obtaining ready agreement about phrases which attend the drafting of legislative measures by large assemblages.

[51] The entries in the legislative lists are merely legislative fields or heads of an enabling character (*The State of Bihar v Maharajadhiraja Sir Kameshwar* (1952) 1 SCR 889). They give the 'outline of the subject matter of legislation' (*Karnataka Bank Ltd v State of Andhra Pradesh and others* (2008) 2 SCC 254) and are to be regarded as 'enumeratio simplex of broad categories' (*The State of Rajasthan v Shri G Chawla and Dr Pohumal* (1959) AIR 544). The nature of the legislative lists was well-articulated by the Supreme Court of India in *Jilubhai Nanbhai Khachar Etc v State of Gujarat & Ors* AIR 1995 SC 142:

> It is settled law of interpretation that entries in the Seventh Schedule are not powers but fields of legislation. The legislature derives its power from Article 246 and other related Articles of the Constitution. Therefore, the power to make the Amendment Act is derived not from the respective entries but under Article 246 of the Constitution. ...
>
> *The Lists are designed to define and delimit the respective areas of respective competence of the Union and the States. They neither impose any implied restriction on the legislative power conferred by Article 246 of the Constitution, nor prescribe any duty to exercise that legislative power in any particular manner. Hence, the language of the Entries should be given widest scope to find out which of the meaning is fairly capable in the set up of the machinery of the government.* Each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it. In interpreting an Entry, it would not be reasonable to impart any limitation by comparing or contrasting that Entry with any other one's in the same list. (Emphasis added.)

[52] As such, the entries are not to be read narrowly or pedantically. Instead, they are to be liberally interpreted with the widest amplitude, extending to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended therein (*Prem Chand Jain & Anr v RK Chhabra* 1984 SCR (2) 883, *Godfrey Phillips (I) Ltd & Anr v State of UP & Ors* (2005) 2 SCC 515). The extent of the width to be given in interpreting the entries in the legislative lists was illustrated by the Indian Supreme Court in *Elel Hotels and Investments v Union of India* (1989) SCR (2) 880:

> In interpreting expressions in the legislative lists a very wide meaning should be given to the entries. In understanding the scope and amplitude of the expression 'income' in Entry 82, list I, *any meaning which fails to accord with the plenitude of the concept of 'income' in all its width and comprehensiveness should be avoided. The cardinal rule of interpretation is that the entries in the legislative lists are not to be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. The widest possible construction, according to the ordinary meaning of the words in the entry, must be put upon them.* Reference to legislative practice may be admissible in reconciling two conflicting provisions in rival legislative lists. In construing the words in a constitutional document conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude. (Emphasis added.)

[53] By giving the widest amplitude to an entry, difficulties in ascertaining the limits of legislative competence are resolved, as far as possible, in favour of the legislative body. In *Jilubhai Nanbhai Khachar Etc v State of Gujarat & Ors* AIR 1995 SC 142, the Indian Supreme Court held:

> *When the vires of an enactment is impugned, there is an initial presumption of its constitutionality and if there is any difficulty in ascertaining the limits of the legislative power, the difficulty must be resolved, as far as possible in favour of the legislature putting the most liberal construction upon the legislative entry so that it may have the widest amplitude. Burden is on the appellants to prove affirmatively of its invalidity*. It must be remembered that we are interpreting the Constitution and when the court is called upon to interpret the Constitution, it must not be construed in any narrow or pedantic sense and adopt such construction which must be beneficial to the amplitude of legislative powers. The broad and liberal spirit should inspire those whose duty is to interpret the Constitution to find whether the impugned Act is relatable to any entry in the relevant List. (Emphasis added.)

[54] However, the wide amplitude to be accorded to the legislative lists is not without limit. The rule of widest construction does not extend to matters with no rational connection to the entry. As held by the Indian Supreme Court in *Union of India & Ors v Shah Goverdhan L Kabra Teachers* (2002) 8 SCC 228; (2002) 7 SCALE 435:

> It has been a cardinal principle of construction that the language of the entries should be given the widest scope of which their meaning is fairly capable and while interpreting an entry of any List it would not be reasonable to import any limitation therein. *The rule of widest construction, however, would not enable the legislature to make a law relating to a matter which has no rational connection with the subject matter of an entry* ... The Court sometimes is duty bound to guard against extending the meaning of the words beyond their reasonable connotation in anxiety to preserve the power of the legislature. (Emphasis added.)

[55] Neither does the rule of widest construction permit the court to interpret one entry so as to override another entry or render it meaningless. In the event of apparent conflict between entries, the entries should as far as possible be reconciled by a harmonious construction (*Harakchand Ratanchand Banthia v Union of India And Ors* (1969) 2 SCC 166). This principle was also highlighted in *Union of India & Ors v Shah Goverdhan L Kabra Teachers*:

> ... *While an entry is to be given its widest meaning but it cannot be so interpreted as to over-ride another entry or make another entry meaningless and in case of an apparent conflict between different entries, it is the duty of the court to reconcile them*. When it appears to the Court that there is apparent overlapping between the two entries the doctrine of 'pith and substance' has to be applied to find out the true nature of a legislation and the entry within which it would fall. (Emphasis added.)

[56] The proper approach to be adopted by a court faced with apparently conflicting entries was elucidated by the Privy Council in *Citizens Insurance Co*

of Canada v Parsons; Queen Insurance Co v Parsons [1881–85] All ER Rep 1179; (1881) 7 App Cas 96:

> In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each Legislature, and to define in the particular case before them the limits of their respective powers. *It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.* (Emphasis added.)

[57] In view of the peculiar nature of the entries, courts must be mindful to confine their interpretations thereof to the concrete question that has arisen in the case. As the Privy Council noted in *Deere (John) Plow*:

> The structure of Sections 91 and 92, and the degree to which the connotation of the expressions used overlaps, render it, in Their Lordships' opinion, unwise on this or any other occasion to attempt exhaustive definitions of the meaning and scope of these expressions. Such definitions, in the case of language used under the conditions in which a constitution such as that under consideration was framed, must almost certainly miscarry. It is in many cases only by confining decisions to concrete questions which have actually arisen in circumstances the whole of which are before the tribunal that injustice to future suitors can be avoided.

[58] These well-established principles have been accepted and applied in Malaysia. In *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals* [1997] 3 MLJ 23, the Court of Appeal held at p 37:

> It is a well-settled principle of constitutional interpretation that every entry in each Legislative List must be given its widest significance and that its scope cannot be curtailed save to the extent necessary to give effect to other legislative entries: *State of Bombay v Narottamdas Jethabhai* AIR 1951 SC 69.
>
> In *JC Waghmare & Ors v State of Maharashtra* AIR 1978 Bom 119 at p 137, Tulzapurkar Ag CJ, when delivering the judgment of a strongly constituted Full Bench of the Bombay High Court, after a review of the leading authorities upon the subject, summarised the applicable principles as follows:
>
> > From the above discussion, the following general principles would be clearly deducible: (a) entries in the three Lists are merely legislative heads or fields of legislation; they demarcate the area over which the appropriate legislatures can operate; (b) allocation of subjects in the Lists is not by way of scientific or logical definition but is a mere enumeration of broad and comprehensive categories; dictionary meaning of the words used, though helpful, is not decisive; (c) entries should be interpreted broadly and liberally, widest amplitude being given to the

words employed, because few words of an entry are intended to confer vast and plenary powers; (d) entries being heads of legislation, none of the items in the Lists is to be read in a narrow and restricted sense but should be read broadly so as to cover or extend to all cognate, subsidiary, ancillary or incidental matters, which can fairly and reasonably be said to be comprehended in it; (e) since the specific entries in the three Lists between them exhaust all conceivable subjects of legislation, every matter dealt with by an enactment should as far as possible be allocated to one or the other of the Entries in the Lists and the residuary Entry 97 in List I should be resorted to as the last refuge; and *(f) if entries either from different Lists or from the same List overlap or appear to conflict with each other, every effort is to be made to reconcile and bring out harmony between them by recourse to known methods of reconciliation*. (Emphasis added.)

[59] In addition to the entries in the Legislative Lists, the Court of Appeal further emphasised that the phrase 'with respect to' in art 74 is likewise to be interpreted with a wide amplitude:

> It is also well-settled that the phrase 'with respect to' appearing in art 74(1) and (2) of the Federal Constitution — the provision conferring legislative power upon the Federal and State Governments respectively — is an expression of wide import. As observed by Latham CJ in *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at p 186, in relation to the identical phrase appearing in s 51 of the Australian Constitution which confers Federal legislative authority:
>
> > *A power to make laws 'with respect to' a specific subject is as wide a legislative power as can be created. No form of words has been suggested which would give a wider power. The power conferred upon a Parliament by such words in an Imperial statute is plenary* — as wide as that of the Imperial Parliament itself: *R v Burah* (1878) 3 App Cas 889; *Hodge v R* (1883) 9 App Cas 117. But the power is plenary only with respect to the specified subject. (Emphasis added.)

[60] The above passages in *Ketua Pengarah Jabatan Alam Sekitar* were quoted in full with approval by this court in *Fathul Bari bin Mat Jahya & Anor v Majlis Agama Islam Negeri Sembilan & Ors* [2012] 4 MLJ 281 at pp 292–293. This court in *Fathul Bari* accorded a wide and liberal meaning to the phrase 'precepts of Islam' in the State List, and held that s 53 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 fell within the competence of the State Legislature under that entry.

[61] In brief, the principles applicable to the interpretation of entries in the legislative lists as established in the cases above may be condensed thus:

(a) the entries in the legislative lists do not confer legislative power. Rather, they are broad heads or fields of legislation to demarcate the respective areas in which Parliament and the State Legislature may operate;

(b) the entries must be interpreted liberally with the widest amplitude, and not narrowly or restrictively. Each entry extends to all ancillary and subsidiary matters which can fairly and reasonably be said to be comprehended in it;

(c) the rule of widest construction does not permit an entry to be interpreted so as to include matters with no rational connection to it, or to override or render meaningless another entry;

(d) in the event of apparent conflict or overlap between entries, the court should attempt to reconcile the entries by adopting a harmonious construction; and

(e) in interpreting a particular entry, the court should confine its decision to the concrete question arising from the case, without pronouncing a more exhaustive definition than is necessary.

[62] At the risk of stating the obvious, we wish to underline that the above principles relate only to the *competence* of a legislative body to make law in respect of a particular matter. Where the body had the requisite legislative competence to enact a law, the *constitutional validity* of the law still depends on its compliance with other provisions of the Federal Constitution, for instance the articles on fundamental liberties in Part II.

EJUSDEM GENERIS IN INTERPRETATION OF LEGISLATIVE LISTS

[63] The petitioner seeks to rely on the rule of ejusdem generis to support their contention that the term 'corporations' in item 8(c) is confined to corporations aggregate established under the Companies Act 1965/2016. According to the *ejusdem generis* rule, where general words follow particular and specific words, the general words must be confined to things of the same kind as those specified by the preceding words (*Public Prosecutor v Voon Nyuk Tze & Anor* [1965] 2 MLJ 131).

[64] At the risk of repetition, it should first be reiterated that a constitution, being sui generis, calls for its own principles of interpretation; the principles normally used in interpreting an ordinary statute are not necessarily applicable (*Dato Menteri Othman bin Baginda* and *Badan Peguam Malaysia*).

[65] With regard to the legislative lists in particular, the broad nature of the entries and the wide amplitude to be accorded to them point against the applicability of *ejusdem generis*. As explained in MP Jain, *Indian Constitutional Law* (6th Ed, India: LexisNexis Butterworths Wadhwa Nagpur, 2010) at p 574, the specific words in the entry serve to amplify rather than to restrict the scope of the general words:

> The framers of the Constitution wished to take a number of comprehensive categories and describe each of them by a word of broad and general import. For example, in matters like 'Local Government', 'Education', 'Water', 'Agriculture', and 'Land', the respective entry opens with a word of general import, followed by a number of examples or illustrations or words having reference to specific sub-heads or aspects of the subject-matter. The effect of the general word, however, is not curtailed, but rather amplified and explained, by what follows thereafter.

[66] Article 74(4) further places beyond doubt that the rule of *ejusdem generis* does not apply to entries in the legislative lists:

> (4) Where general as well as specific expressions are used in describing any of the matters enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter.

[67] Hence, the rule of *ejusdem generis* lends no support to the petitioner's case in respect of the interpretation of entries in the legislative lists. Based on the above principles, the words 'incorporation ... of corporations other than municipal corporations' in item 8(c) of the Federal List ought to be given the widest amplitude. Interpreting the phrase broadly, the incorporation of the office of the Chief Minister is clearly a matter which can fairly and reasonably be said to be comprehended in item 8(c). There is nothing in item 8(c) to suggest that the legislative power of Parliament is restricted to specific types of corporations (other than municipal corporations), such as corporations aggregate established under the Companies Act.

[68] For the above reasons, we hold that under art 74 and item 8(c) of the Federal List, the legislative competence of Parliament encompasses matters with respect to the incorporation of the Chief Minister of Penang, and all matters ancillary, subsidiary or incidental thereto.

PITH AND SUBSTANCE

[69] We turn to consider whether Act 380 and Enactment 9, in pith and substance, relate to a matter within the legislative competence of Parliament and the Penang State Legislature respectively.

[70] The 'pith and substance' test requires the court to ascertain 'the true nature and character of the legislation and scrutinise it in its entirety, to decide whether it is a lawful exercise of the legislative authority of Parliament in relation to the entry' (*Attorney-General for Ontario v Reciprocal Insurers and others (Attorney-General for Canada, intervener)* [1924] AC 328 (PC) at p 337; see also the Privy Council's decision in *Union Colliery Co of British Columbia Ltd v Bryden* [1899] AC 580). This test was accepted and applied by both the majority and dissenting views in the then Supreme Court in *Mamat bin Daud*.

Mohamed Azmi SCJ (as His Lordship then was), for the majority, described the test as follows (at p 123):

> In determining whether s 298A, in pith and substance, falls within the class of subject matter of 'religion' or 'public order', *it is the substance and not the form or outward appearance of the impugned legislation which must be considered*. The impugned statute may even declare itself as dealing with religion, but if on investigation of the legislation as a whole, it is in fact not so, the court must so declare. Conversely, it is not sufficient for the impugned legislation to declare itself as dealing with public order if, in substance, it seeks to deal directly or indirectly with religion or religious law, doctrine or precept, for no amount of cosmetics used in the legislative make-up can save it from being struck down for pretending to be what it is not. The object, purpose and design of the impugned section must therefore be investigated for the purpose of ascertaining the true character and substance of the legislation and the class of subject matter of legislation to which it really belongs. (Emphasis added.)

[71] The connection between the substance of the legislation and the matter must not be too indirect or remote to fall within the entry in the Legislative List (*In re A Reference As To The Validity of Section 5(a) of the Dairy Industry Act; Canadian Federation of Agriculture v A-G for Quebec* [1951] AC 179 (PC) at pp 200–201). Incidental effects on matters outside the authorised field do not invalidate the legislation. Per Lord Atkin in *Gallagher v Lynn* [1937] 3 All ER 598; [1937] AC 863 at p 870:

> *If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field.* Nor are you to look only at the object of the legislator. An Act may have a perfectly lawful object, eg, to promote the health of the inhabitants, but may seek to achieve that object by invalid methods, eg, a direct prohibition of any trade with a foreign country. In other words, you may certainly consider the clauses of an Act to see whether they are passed 'in respect of' the forbidden subject. (Emphasis added.)

[72] However, if the encroachment is ostensibly ancillary but in truth beyond the competence of the legislative body, the legislation will be colourable and constitutionally invalid (*Gujarat Ambuja Cements Ltd & Anr v Union of India & Anr* (2005) 4 SCC 214). The doctrine of colourable legislation was explained by the Indian Supreme Court in *KC Gajapati Narayana Deo v The State of Orissa* AIR 1953 Ori 185; (1954) SCR 1, quoted by the majority in *Mamat bin Daud*:

> It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of 'bona fides' or 'mala fides' on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if

A the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power ...

If the constitution of a state distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape
B of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. *Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression 'colourable legislation' has been applied*
C *in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears on proper examination to be a mere pretence or disguise.* (Emphasis added.)

D SUBSTANCE OF ACT 380 AND ENACTMENT 9

[73] Bearing in mind the principles aforementioned, we now examine Act 380. The long title of Act 380 states that it is 'An Act relating to the powers
E of State Legislatures to make laws with respect to the incorporation of certain persons and bodies within a State'. Section 3 of the Act states:

3 State Legislatures authorized to make laws relating to the incorporation of certain persons and bodies

It shall be within the power of the Legislature of a State, in relation to any matter
F specified in the First Schedule, to make laws with respect to the incorporation of any person or body within the State, and for such incidental and consequential matters in relation thereto (including the regulation and winding up of any person or body so incorporated) as the Legislature may deem necessary; and the Legislature may from time to time amend or repeal any such laws:

G Provided that with respect to the incorporation of any person or body within the State for the purpose of agricultural development or housing development or of development of urban or rural areas, the special provisions prescribed in the Second Schedule hereto shall have effect.

H **[74]** Item 5 in the First Schedule provides for the 'Incorporation of the Mentri Besar or Chief Minister'.

[75] It is not disputed that Act 380 relates, in pith and substance, to the incorporation of persons and bodies within a state. As discussed earlier, the
I incorporation of corporations (excluding municipal corporations), including all ancillary matters, are encompassed under item 8(c) of the Federal List. Additionally, Parliament is expressly authorised by art 76A of the Federal Constitution to delegate its legislative powers in respect of matters in the Federal List to the State Legislatures. In the present case, Parliament did so by

enacting Act 380, which authorises State Legislatures to make laws with respect to the incorporation of, among others, the Chief Minister.

[76] Exercising the delegated legislative power pursuant to Act 380, and in accordance with s 3 and the First Schedule thereof, the Penang State Legislature passed Enactment 9. Section 3 of Enactment 9 provides for the incorporation of the Chief Minister of Penang. Sections 4 and 5 of the same state the various powers of the Chief Minister of Penang incorporated, which can be fairly and reasonably comprehended as matters ancillary or incidental to its incorporation.

[77] It is evident to us that Act 380 relates to a matter enumerated in the Federal List, thus within the legislative competence of Parliament under art 74. Enactment 9 relates to a matter enumerated in the Federal List, on which the power to make laws has been validly delegated by Parliament to the State Legislature under art 76A. We do not consider that in doing so, Parliament or the State Legislature had covertly or indirectly encroached upon forbidden territory.

[78] Accordingly, we find that Act 380 makes provision with respect to a matter which Parliament has power to make laws, whereas Enactment 9 makes provision with respect to a matter which the Penang State Legislature has power to make laws.

CONCLUSION

[79] In view of the foregoing, we do not find Act 380 and Enactment 9 to be invalid on the ground that the laws relate to matters beyond the legislative competence of Parliament and the State Legislature respectively. The remaining grounds of invalidity raised by the petitioner lie beyond the scope of this petition and the exclusive original jurisdiction of this court.

[80] The petition is dismissed. Pursuant to s 83 of the Courts of Judicature Act 1964, we make no order as to costs.

Petition dismissed.

Reported by Afiq Mohamad Noor